The Secretary stresses the fact that the primary objective of the Snyder Act was to resolve a jurisdictional battle in the House between the Indian Affairs subcommittee and the appropriations committee. The Secretary's conclusion that the statutory language is therefore meaningless is not justified, however, either in logic or in history. In addition to the procedural ends to which the Act was directed, it also constitutes the basic description by Congress of the duties and responsibilities of the Secretary of the Interior in the field of Indian Affairs. The choice of the mandatory language, "shall expend," and the expansive language, "throughout the United States," was no less intentional because the primary purpose was clarification. The Act thus stands as the basic mandate of Congress in regard to the duties of the Secretary and there is no authority vested in him to revise the statutory language by refusing to expend funds appropriated for specific Snyder Act programs. *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579. The plain language of the Act mandates expenditure of "such moneys as Congress may from time to time appropriate" and the relevant inquiry therefore is whether Congress has appropriated funds for the relief of distress of non-reservation Indians. If Congress has done so, the Snyder Act directs that the Secretary "shall . . . expend" such funds.

II.

THE LEGISLATIVE HISTORY OF THE 1968 APPROPRIATIONS ACT SHOWS THAT CONGRESS DID NOT INTEND TO MODIFY THE BASIC SNYDER ACT RESPONSIBILITIES OF THE SECRETARY OF THE INTERIOR.

1. The Appropriations Act for the Department of the Interior and Related Agencies, 1968, PL 90-28, 81 Stat

59, provides certain monies, "For expenses necessary to provide education and welfare services for Indians . . .". There is no support in that language for a restriction of welfare or education benefits to reservation residents, and indeed the BIA extends *educational* benefits to Indians without regard to residency. See: 25 CFR §22.8. In the same paragraph, other monies are appropriated to deal with, ". . . violations of law on Indian reservations and lands." It is thus clear from the statutory language of the Appropriations Act itself that when Congress wished to restrict expenditures to the reservations it did so by specific language. The failure to so limit funds in the area of education and welfare can only be read as intentional.[1]

While the meaning of the appropriations act is plain on its face, resort to legislative history further supports the conclusion that Congress did not intend to limit the Secretary's Snyder Act duties.

2. The validity of the general rule against resort to such matters as committee hearings when statutory language is not ambiguous is amply justified by the confusion that is found in those hearings in this case. The question of services to off reservation Indians has been discussed on numerous occasions beginning in 1942. The 1942 hearings dealt specifically with the problems of urban Indians.[2] The Senate committee was told that the Secretary could not use funds for Indians in urban areas because the language of the appropriation act contained restrictive wording that limited expenditures to rural

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[1]That conclusion is furthered by reference to several other statutes in which Congress has demonstrated its full awareness of the distinction which the government now asks this Court to infer. See e.g. 25 U.S.C. §479; 25 U.S.C. §309.

[2]Hearings, Senate Committee on Appropriations, Subcommittee on Department of the Interior and Related Agencies, on HR 4590 (Fiscal 1942) 77th Congress 1st Session, 1941, pp 160-162, 465, 6.

areas.[3] The committee was assured that once that language was removed urban areas would be served.[4] It is significant to note that the language was thereupon removed, presumably in response to these statements, and has not been included in any subsequent act. Thus there is evidence that beginning in 1942 Congress believed that it was appropriating funds that were not limited to reservation Indians.

As the Secretary has quite correctly pointed out, however, there have been times when his representatives have indicated the existence of the reservation limitation. In 1947 the Senate was flatly told that benefits are not available to off reservation groups.[5] Again, in 1951, a similar limitation was expressed in response to a question from Senator Young. In regard to an Indian who leaves North Dakota and goes to the State of Washington, Mr. Meyer responded:

> "That presents a problem that is a matter of very basic policy. That is a matter of whether or not we are going to extend our services to Indians wherever they are and follow them around the United States as they leave the reservation with the type of service we are providing on the reservation. I think there are certain services that could be provided by the community, and someone should see to it that they get the services if it is possible to do so."[6]

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[3]However, as early as 1928 the Bureau was in fact providing services for non-reservation "urban" Indians. Hearings, Senate Committee on Indian Affairs, Subcommittee on Survey of Conditions of Indians of the United States, 71st Congress, 3rd Session, 1931, Arizona, Part 17, pp 8331-8343.

[4]*supra*, note 2.

[5]Hearings, Senate Committee on Appropriations, Subcommittee on Department of Interior and Related Agencies, HR 3123 (Fiscal 1948) 80th Congress 1st Session 1947, pg 598-599.

[6]Hearings, Senate Committee on Appropriations, Subcommittee on Department of the Interior and Related Agencies, on HR 3790 (Fiscal 1952) 82nd Congress 1st Session 1951, pp 372-3.

There are two elements in that statement which should be noted: (1) the concern that the off reservation Indian be eligible for local benefits; and (2) the administrative difficulty involved in servicing non-reservation Indians. These themes continue in the following years and it is, therefore, important to emphasize that neither consideration is presented by the facts of this case. The respondents here are living in an Indian community more easily accessible to the Secretary's agents (in terms of both time and distance) than are many areas of the reservation itself. See: App.A, *infra*. Secondly, it is agreed that respondents were not eligible for any programs funded by state or local government.[7]

In 1961 the picture became even more confused when Mr. Emmons announced to the House that the Secretary was beginning a program for the Turtle Mountain Reservation in North Dakota which would remove a substantial number of families to off reservation communities and provide welfare assistance for an indefinite period.[8] Such a program belies any general residency requirement, and yet the formal written request for that year contains the same "needy Indians on reservations" language upon which the Secretary relies to support his argument.[9] It is thus clear that neither the Secretary's representatives nor the appropriations committees regarded the language of the written request as controlling, and we must continue to look primarily to the oral presentations to the committees.

[7]Indeed, if they were they would not be eligible for BIA benefits. See: 66 IAM 3.1.4 B, App.58.

[8]Hearings, House Committee on Appropriations, Subcommittee on Department of the Interior and Related Agencies (Fiscal 1961) 86th Congress 2nd Session 1960, pp 508-10

[9]*id.*

Throughout the years of hearings in regard to Indian Appropriations one finds constant reference to the fact that the Bureau extends its services to non-reservation Indians notwithstanding the limited language of the formal appropriations request.

In 1961 Mr. Crow suggested that the relevant standard was whether or not an Indian was assimilated without mentioning reservation status:

> Services are, *in general*, limited to those arising out of our relationship regarding trust property and to those Indian people who reside on trust or restricted land. Funds are not included in these estimates for furnishing services to Indian people *who have established themselves in the general society*.[10]

In 1962, Mr. Officer, in response to a question regarding the number of Indians who receive BIA services, told the House Committee:

> MR. OFFICER. We are citing our figure of 380,000 to include those Indians who live *in the reservation vicinity* and *are eligible to receive our services*, as well as the Indians and other Alaska natives. The total of Alaska natives is 43,000. When we subtract that from 380,000, we have 337,000 Indians who live *on or near reservations* outside Alaska. Now if we are going to be concerned only with those who live on reservations, then we have that figure of 285,000, which was in our press release.
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> * * * * *

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[10] *(emphasis added)*, Hearings, House Committee on Appropriations, Subcommittee on Department of the Interior and Related Agencies (Fiscal 1962) 87th Congress 1st Session 1961, p. 98. See also, Hearings, Senate Committee on Appropriations, Subcommittee on Department of the Interior and Related Agencies, on HR 6345 (Fiscal 1962) 87th Congress, 1st Session 1961, p. 107.

MR. DENTON. What do you do in places like Oklahoma, where the Indians live "checkerboard"?

MR. OFFICER. It is for that reason that we cite figures of Indians living on or near reservations; *because we have a number of situations similar to those in Oklahoma, where you don't have a well-defined reservation boundary.*[11]

In 1963, the House was told by Mr. Nash:

MR. NASH. First, with respect to the population, it is not true our population is declining. Our Federal service Indian population is increasing, very rapidly. The easiest way to dramatize this, I think, is to cite the fact that when all Indians were on reservations, and nobody was living off, back in the 1880's the census of 1880 showed about 225,000 Indians. More Indians than that living on the reservations were shown in the 1960 census. *Close by the reservations we also have all kinds of responsibilities. We have Oklahoma, Alaska, and other places that do not have reservations.*

* * * * *

We have a need for services for 380,000 people. This includes those who are living directly on the reservations, and *those who are living very close, so that the way in which they live affects reservations programs.* They move back and forth, et cetera. We call this our "Federal service to Indian population" and it is larger this year than last. It grows by decades and will grow very rapidly in the near future.

I wanted to be sure that that was in the record, sir.[12]

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[11] *(emphasis added)*, Hearings, House Committee on Appropriations, Subcommittee on Department of the Interior and Related Agencies (Fiscal 1963) 87th Congress 2nd Session 1962 pp 352-4.

[12] *(emphasis added)*, Hearings, House Committee on Appropriations, Subcommittee on Department of the Interior and Related Agencies (Fiscal 1964) 88th Congress 1st Session 1963, pp 888-89.

Again the answer implies no absolute restriction to reservation Indians.

In 1964, Senator Bible asked the very question involved in this case:

> SENATOR BIBLE. How many Indians do you have under your jurisdiction?
>
> MR. NASH. 380,000
>
> SENATOR BIBLE. How many nonreservation Indians do you have? Are those just reservation Indians?
>
> MR. NASH. *These are on or near*. This would not include, for example, Indians living in Los Angeles, San Francisco, Chicago, Denver, Minneapolis, unless they were brought there as part of our vocational training or relocation programs.
>
> * * * * *
>
> SENATOR BIBLE. Following the Chairman's question, where does your jurisdiction rest in that regard? Do you have a measuring stick?
>
> MR. NASH. No, sir. Our basis for providing services to an Indian is primarily on real estate. That is, we service those individuals who reside on trust or restricted land, *or so close to it* that the program of the reservation would be affected by services not performed for that person. [13]

The figure of 380,000 Indians living "on or near" reservations was repeated in 1967 when Commissioner Bennett and Senator Bible engaged in the following colloquy:

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[13] *(emphasis added)*, Hearings, Senate Committee on Appropriations, Subcommittee on Department of the Interior and Related Agencies, on HR 10433 (Fiscal 1965) 88th Congress 2nd Session 1964, pp 227-8.

INDIAN POPULATION

SENATOR BIBLE (presiding). Thank you Senator Bartlett.

Mr. Commissioner, and I am sorry because you may have covered this in earlier questioning, but what is the total Indian population *under your jurisdiction* at the present time?

MR. BENNETT. The total Indian population under our jurisdiction at the present time is 380,000. *These are on or near reservations* and comprise our *service population* based on the 1960 census.[14]

Again in 1968, the year in issue in this case, Commissioner Bennett filed a written statement that increased the service population by 20,000 and again described his "service population" in terms of the "on or near" restriction, as well as the degree of assimilation:

> We are a modern service bureau, serving as many as 400,000 Indians and Alaska Natives who live on or near reservations—people who find themselves isolated from the mainstream of American life—existing in poverty.[15]

In the same year, Mr. Carmack told the Senate Committee that 9,000 "Indian" families receive general assistance from the BIA and 18,000 receive assistance from state programs.[16] But once again there was no dividing line based on the reservation and Mr. Carmack again invoked the "on or near" language:

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[14]*(emphasis added)*, Hearings, Senate Committee on Appropriations, Subcommittee on Department of the Interior and Related Agencies, on HR 9029 (Fiscal 1968) 90th Congress 1st Session 1967, p. 819.

[15]Hearings, Senate Committee on Appropriations, Subcommittee on Department of the Interior and Related Agencies, on HR 17354 (Fiscal 1969) 90th Congress 2nd Session 1968, p. 368.

[16]*id*, 710.

> Thus, it is reasonable, we feel, to assume that about a quarter or a third of the Indian families on or near Indian reservations receive some kind of help, and the remainder would be essentially self-supporting.[17]

Finally, in 1971, Commissioner Bruce was asked to clear up the confusion and specifically define the jurisdiction of the Bureau of Indian Affairs with particular reference to the lack of precision of the "on or near" language. He was unable to define "on or near", but did submit a written report in an attempt to clarify his responsibility. That report ambiguously provides, in part, as follows:

> *Services*
>
> Every Indian in the service area may not be receiving BIA services. He may not apply for them, or he may not meet conditions for certain services. For example, adult vocational training is limited to persons with one-fourth or more Indian blood, land services benefit owners and operators of trust land, and BIA welfare services are supplemented to local provisions of welfare. At the same time, Indian residents outside the service area may receive certain services. Examples are former residents in training away from the reservation under the adult vocational training program, owners of trust land who receive lease payments, and recipients of judgment awards.[18]

Against that background of uncertainty the problem was fully aired in both the House and Senate in 1971. Chairman Hansen stated to Congressman Fraser:

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[17] *id.*

[18] Hearings, Senate Committee on Appropriations, Subcommittee on Department of the Interior and Related Agencies, on HR 9417 (Fiscal 1972) 92nd Congress 1st Session 1971, p. 753.

"I notice in your statement you say, 'Assistant Secretary Loesch finally admitted last year the "hands off" policy regarding urban Indians was based on informal understandings with the Congressional appropriations committees.' This is not true. Assistant Secretary Loesch has never reached any understanding in that connection with this committee."[19]

At later point Chairman Hansen noted:

"Our appropriation bill has never carried a limitation on expenditures concerning Indians."[20]

The Senate proceedings that year were even more specific because Senator Bible vigorously attacked the obvious confusion over the meaning of the term "on or near." In an incredible colloquy with Commissioner Bruce, the Senator was moved to exclaim:

> If I were to become the Commissioner of Indian Affairs, God forbid, how would I know who I had jurisdiction over?[21]

The answer was not forthcoming as a reading of the full discussion will indicate.[22] The reason for the inability of the Secretary to articulate a clear standard stems from the fact that in reality there is no standard. As the Court of Appeals concluded:

"By 1966 the Bureau was providing full welfare benefits for certain off-reservation groups, denying

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[19]Hearings, House Committee on Appropriations, Subcommittee on Department of the Interior and Related Agencies (Fiscal 1972) 92nd Congress 1st Session 1971, Part 6, p. 104.

[20]*id*, 107.

[21]Hearings, Senate Committee on Appropriations, Subcommittee on Department of the Interior and Related Agencies, HR 9417, (Fiscal 1972) 92nd Congress, 1st Session, 1971, p. 751.

[22]*id*, 751-753 and see, Pet.Cert.App.A., pp 27-28 note 24.

benefits entirely to other groups and considering the provision of limited general assistance to still other groups."[23]

There are at least three categories of off-reservation Indians outside of Oklahoma and Alaska who are in fact treated or have been treated as eligible for general assistance, notwithstanding the language of the regulation.

The first of these categories is the relocated Indian who is eligible for general assistance regardless of who he is, where he comes from, or where he resides provided only that he be sent there by the Secretary.[24]

The second of these categories are Indians from the Turtle Mountain reservation in North Dakota who seem to have the absolute right to live wherever they wish.[25] Although the proposition is far from clear, the Secretary appears to be willing to undertake the burden of following them wherever they go in the United States.[26]

The third category are those Indians residing in Rapid City, South Dakota. It is not clear exactly what benefits this category of off-reservation Indians are entitled to, but it is clear that they can get some assistance if necessary.[27]

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[23]*id.*, 26-27.

[24]Hearings, Senate Committee on Appropriations, Subcommittee on Department of the Interior and Related Agencies, on HR 10746 (Fiscal 1959) 85th Congress 2nd Session 1958, p. 293, and see, Pet.Cert.App.A. p. 23, note 17.

[25] Hearings, House Committee on Appropriations, Subcommittee on Department of the Interior and Related Agencies (Fiscal 1961) 86th Congress 2nd Session 1960, pp 508-10.

[26]*id.*

[27]Hearings, Senate Committee on Appropriations, Subcommittee on Department of the Interior and Related Agencies on HR 14215 (Fiscal 1967) 89th Congress 2nd Session 1966, pp 298, 300-302.

It is difficult, at best, to conclude, that Congress legislated in the light of the "clear practice" of the Secretary. It is even more difficult to assume, as the Secretary would have this Court now do, that the "clear practice" was incorporated *sub silento* as a limitation upon the plain language of the appropriations act and, therefore, the even plainer language of the Snyder Act.

3. The government's final argument is based upon the fact that an internal agency instruction (66 BIAM §3.1.4 A) regarding the limitation has been contained in the Bureau of Indian Affairs Manual since 1952. Accordingly, the Secretary argues, "Congress legislated in the light of the clear provision in the Department's manual limiting welfare payments to reservation Indians." Pet.Cert. 14. Aside from the fact that the Secretary's interpretation of the challenged provision has been anything but clear and consistant, it should be noted that under the procedures established in the IAM itself only policies and procedures which "do not relate to the public" are contained in the Manual. O BIAM 1.2: App. 100. Matters which "relate to the public" including eligibility standards are to be published in the Federal Register and codified in the Code of Federal Regulations. Obviously, the Secretary considers the instruction to be a purely internal matter that does "not relate to the public" and about which the public does not need to be informed. In light of that fact, it is impossible to assume that the duly constituted representative of the public, the Congress, was aware of the challenged regulation.

In conclusion, Respondents believe that when the plain words of the relevant statutes are read against the background of legislative history that the Secretary's position is without foundation. Over the course of years this Court has construed remedial statutes in a liberal

fashion and has articulated a particular standard of statutory construction applicable to cases such as the one at bar:

> Doubtful expressions are to be resolved in favor of the weak and defenseless people who are wards of the nation, dependent upon its protection with good faith. *Squire v. Capoeman*, 351 U.S. 1, 6-7

Respondents submit that the Court of Appeals correctly applied that standard in concluding that the challenged instruction was not authorized by the applicable statutes. The burden is thus upon the Secretary to show that Congress has amended the plain language of the statutes by later legislation. He has not and, we submit, cannot do so.

III.

THE REGULATION AS APPLIED TO RESPONDENTS IS IN CONFLICT WITH EQUAL PROTECTION OF LAWS STANDARDS INCORPORATED INTO THE FIFTH AMENDMENT AND PENALIZES RESPONDENTS FOR EXERCISING THEIR FUNDAMENTAL RIGHT TO TRAVEL WITHOUT NECESSARY JUSTIFICATION.

A recent BIA publication succinctly describes the allocation of responsibility for economic assistance to American Indians:

> Social Services
>
> The major participation by the States in this function was precipitated by the passage of the Social Security Act in 1935.
>
> The categorical aid programs under Social Security (Old Age Assistance, Aid to Blind, Aid to

Families with Dependent Children, and Aid to Premanently and Totally Disabled) are administered through the States for *all of their citizens including their Indian citizens both on and off Federal reservations*. Over 81,000 (17 percent of the reservation total of 488,083) Indians living on reservations as of June 1971 were receiving categorical aid assistance.

Many Indian families are in need of assistance who do not qualify for one of the categorical aids. Assistance provided to this group by the BIA is called General Assistance. States and localities also provide general assistance to needy persons not eligible for the categorical aids. (Emphasis added) Taylor, *The States and Their Indian Citizens*, pg. 31 (United States Department of the Interior, Bureau of Indian Affairs, USGPO 1972)

It can thus be seen that the BIA General Assistance Program is supplementary to the Social Security Act and other programs carried out by the states. It is obviously designed to provide emergency[28] aid to a group of citizens who occupy a unique status in American society by virtue of their economic isolation, history, culture and degree of assimilation into the dominent society.

Thus, while the federal government has in effect said to the states "your responsibility does not end at the reservation boundary," see: *Arizona v. Hobby*, 221 F.2d 498 (1954); *Acosta v. San Diego County*, 126 Cal. App.2d 455, 272 P.2d 92 (1954); c.f., 42 USC §1352(b), the Secretary has whispered "but mine does." For a

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[28]It is particularly important to note that BIA General Assistance is only available when *all* other forms of state and local relief are unavailable. (See 66 IAM 3.4.B, App.58)

number of reasons respondents believe the Secretary's action is unconstitutional as applied to them.

1. The Secretary's instruction (66 IAM 3.4.1) creates two classes of indigent Indians in regard to general assistance programs administered under the Snyder Act. The first and favored class is composed of (a) reservation and non-reservation Indians in Alaska and Oklahoma; and (b) reservation Indians in other states. The second and disfavored class is composed of non-reservation Indians in all states except Alaska and Oklahoma. Thus, non-reservation Indians in Arizona are not entitled to receive BIA General Assistance while a non-reservation Indian in Oklahoma is entitled to receive such assistance.

The Secretary offers three justifications for the obvious discrimination against non-reservation Indians such as respondents:

> "Much of Oklahoma was once set aside as an Indian territory, and though most of the reservations have been abolished, there remains a large area of concentrated Indian population with tribal organization, living on land held in trust by the United States." Opening brief p 21.

In regard to each of those assertedly distinguishing characteristics Arizona is nearly identical. (1) A recent BIA publication shows that Arizona and Oklahoma have nearly the same Indian population. (Arizona 95,812 - Oklahoma 97,731) And indeed in terms of percentage of total population Arizona (5.41%) has a greater concentration of Indians than Oklahoma (3.82%). See Taylor, *The States and Their Indian Citizens*, Appendix B, pages 176-177 (United States Department of the Interior, Bureau of Indian Affairs, Washington, D.C. 1972). The same study shows that Arizona has a far greater total of trust land (19,623,265.01 acres) than does Oklahoma (1,395,977.29 acres) which accordingly reduces the tax

base and affects the ability of state and local governments to fund social programs.[29] In terms of the historic ownership of the land the two states are again similar. Indeed, the respondent in the case at bar resides on land that the Indian Claims Commission has recently described as illegally taken from the Papago tribe (See, Statement, *supra*; App.A., *infra*).

In sum, the Arizona and Oklahoma situations are the same by any relevant measure and yet the Secretary provides General Assistance benefits to Oklahoma Indians without regard to their place of residence. Even if the Secretary were to limit benefits to Indians residing on land that was historically theirs (e.g. the Oklahoma reservations abolished after the Civil War) the respondents' status as unassimilated Indians living on land to which their tribe had aboriginal title should by equal measure entitle them to benefits. In short, there is no rational basis upon which respondents in the case at bar can be distinguished from those Indians in Oklahoma to whom benefits are paid.

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[29]While the Secretary has not argued in the case at bar that the tax-exempt status of Indian land is relevant, the BIA itself has invoked the presence of tax exempt land as the foundation for its social service program. See: Taylor, *supra*, pp 31-32:

> It is the general position of the Bureau that insofar as possible Indians should have the same relationship to public welfare agencies as non-Indians, and that public welfare agencies should have the same responsibility for providing services and assistance as they have for non-Indians in similar circumstances. It is recognized, however, that there are certain services required by some Indians which are not provided by the State and local welfare agencies, and the tax-exempt status of Indian lands may affect the ability of some States or local governments to meet the needs of Indians, particularly if Indians constitute a considerable portion of their population.
>
> The BIA undertakes to provide necessary assistance and social services for Indians on reservations when such assistance and services are not available through State or local public welfare agencies.

The Secretary argues, however, that the decision of this Court in *Dandridge v. Williams*, 397 U.S. 471, supports his attempt to exclude an entire class of eligible recipients. (Opening Brief 21-22). *Dandridge* and the cases that followed it (*Jefferson v. Hackney*, 406 U.S. 535; *Richardson v. Belcher*, 404 U.S. 78) deal with a quite different situation. In *Dandridge* the challenge was directed to the manner in which available funds had been apportioned among different classes of entitled persons. In the case at bar, the challenge is directed to the decision to totally exclude one class of persons who differ from the entitled class in only the most superficial ways.

Finally, the Secretary argues that the reservation limitation serves the demands of federalism by shifting to the states the burden of caring for indigent Indians. (Opening Brief 20) He thus suggests that "on reservations ... the authority of the Secretary of the Interior is greater and the authority of the states is less" and offers the suggestion as a basis for distinction in the case at bar. In public assistance programs administered by the states, however, all eligible persons within the jurisdiction, including reservation Indians, must be included in the recipient population (*Arizona v. Hobby*, 221 F.2d 498 (1954)), a fact that is hardly consistent with the assertion that on reservations the "authority of the States is less." As for the assertion that on reservations the "authority of the Secretary of the Interior is greater" we need refer only to the concession of the Secretary in this case that his jurisdiction does extend beyond the reservation boundary (Opening Brief 20) and to the numerous instances in which that jurisdiction has been and is today exercised. (See, Argument II(2), *supra*; Pet.App.A. 23-28, notes 13-23).

2. If the Court concludes that the "special history" of Alaska and Oklahoma warrants classification of Indians in

those states as "reservation Indians" the resulting discrimination against non-reservation Indians such as respondents remains. The respondents differ from reservation members of the Papago Tribe in only one way: the fact that they reside 15 miles outside the boundary of their reservation. By every other test they must be considered unassimilated Indians.

The only possible justification for their exclusion from benefits accorded their fellow Indians is administrative economy and ease. But as the decisions of this Court make plain, those considerations, standing alone, cannot justify the discrimination when the government has available to it less restrictive alternative means which can achieve the same administrative needs. See: *Oyama v. California*, 332 U.S. 633, 646-647; *Harman v. Forssenius*, 380 U.S. 528, 542-543; *Carrington v. Rash*, 380 U.S. 89, 96. As this Court noted in *Shapiro v. Thompson*, 394 U.S. 618:

> We recognize that a State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. It could not, for example, reduce expenditures for education by barring indigent children from its schools. Similarly, in the cases before us, appellants must do more than show that denying welfare benefits to new residents saves money. *The saving of welfare costs cannot be an independent ground for an invidious classification (emphasis added)* 394 U.S. *at* 633

3. Even if this Court were to conclude that discrimination between reservation and non-reservation Indians is rational and constitutional under the traditional equal

protection doctrine, respondents respectfully suggest that the discrimination should be measured under the stricter standard applicable to classifications which affect fundamental rights. In *Shapiro v. Thompson*, 394 U.S. 618, this Court concluded that durational residency requirements for public assistance imposed an impermissible burden upon the exercise of the fundamental right to freedom of movement. Precisely the same burden is present in the case at bar. As was noted above, respondents reside in an Indian community that is located within the boundaries of the Papago Tribe's aboriginal land. From their point of view, as well as that of other unassimilated Indians, they have remained at home. (See: Stucki Affidavit, App.84) But because of a boundary line imposed upon them by Executive Order their freedom to move throughout their homeland may be burdened by the loss of substantial governmental benefits. As *Dunn v. Blumstein*, 405 U.S. 330, makes clear, such burdens are unconstitutional, even if rationally based, if the government has available less drastic means of achieving its legitimate objectives. See, also, *Shapiro v. Thompson, supra*.

Respondents concede, as they have since the outset of this litigation, that the government has a legitimate interest in restricting its limited subsistence funds to the unassimilated Indian. But as we have pointed out, the reservation status of an Indian bears no necessary relationship to degree of assimilation. There are undoubtedly some Indians who reside on reservations who by language, culture and economic status must be deemed to have been assimilated into the larger culture. At the same time, there are many Indians, such as the respondents in the case at bar, who have retained their language, culture and economically dependent status notwithstanding their marginal participation in non-reservation society. As the eligibility standard for Public Health Service benefits (42

CFR 36.12) demonstrates, workable functional distinctions between the two groups do exist thus creating less drastic means by which the government's legitimate interests can be effectuated. We have never argued that the government is required to provide subsistence benefits to the fully assimilated Indian residing in Manhattan. We have argued and continue to assert that the government's apparent belief that all non-reservation Indians are assimilated is illogical and unconstitutional.

4. Finally, respondents submit that this case must in any event be judged by the strict scrutiny test because one of the avowed purposes of the regulation is to inhibit movement of reservation Indians. There is every reason to believe that the restriction on travel is not only the result, but the purpose of this regulation. The Secretary's representatives have on several occasions suggested to the Congress that one purpose of the regulatory scheme is to keep poor Indians out of areas like Gallup, New Mexico and Rapid City, South Dakota, where they might go if given a choice, and encourage them to go to Los Angeles or Chicago where they can be more readily absorbed by the communities:

> Mr. Emmons. I can appreciate, of course, what the Senator is referring to because I happen to come from such an area; an area that has quite a few Indians surrounding it. *I can see the problem that could be generated if we did assist an Indian who moved into one of these communities just off the reservation, because, if they were getting relief from the Bureau of Indian Affairs, it would probably be an inducement for maybe thousands of Indians to move into a little community like Gallup, Senator.* Now we could have an influx of maybe 10,000 or 15,000 Navajos into that little community which has probably a maximum population of 14,000

people. That would create a social problem because *if these Indians were getting relief from the Bureau they would probably move in there* and squat on private lands, using cracker boxes for residences; so it could probably create quite a problem.

Now, what we are trying to do in our current programs is to prepare these Indians, give them the required amount of education and training, so that these communities would not be confronted with this terrific impact of welfare Indians.

Do you see what I mean?[30]

Although the desire on the part of the Secretary to protect small inland cities from an influx of indigent Indians is understandable, it is wholly inconsistent with his trustee duty to the Indians. And although it is equally understandable that he might want to keep some Indians on the reservation until he can find a suitable home for them, the Secretary may not constitutionally do so. The purpose of excluding indigents from travel to protect the fiscal status of the destination community is no less impermissable because the impact of the burden falls at the inception of the movement instead of its conclusion. Even if the motive be pure, even if the Court ignores the intent to protect the community of destination, and assumes the highest motive of insuring that the migrating Indian will arrive in a destination offering the best

[30]Hearings, Senate Committee on Appropriations, Subcommittee on Department of the Interior and Related Agencies, on HR 10746 (Fiscal 1959) 85th Congress 2nd Session 1958 p. 293; and see, Hearings, Senate Committee on Appropriations, Subcommittee on Department of the Interior and Related Agencies, on HR 5915 (Fiscal 1960) 86th Congress 1st Session 1959, pp 337-340.

possible economic opportunity, the intentional burden upon the exercise of the fundamental right of movement remains. Under those circumstances the strict scrutiny test articulated in *Shapiro* and *Dunn* is fully and appropriately applicable.

CONCLUSION

Respondents respectfully request that the decision and order of the United States Court of Appeals for the Ninth Circuit be affirmed.

Respectfully submitted.

Winton D. Woods Jr.

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APPENDIX A

In *Papago Tribe of Arizona v. The United States of America*, 19 Ind. Cl. Comm. 394 (1968), the Commission found as follows:

25. *Boundaries of the Papago Land.* The Commission finds that at the date of American accession in 1854 and subsequently until taken from the Papago Tribe of Arizona exclusively occupied and used in Indian fashion, and hence had aboriginal title to the tract bounded and described as follows:

> Commencing at a point on the International Boundary in the Tinajas Altas Mountains which divides the eastern and western drainage of those mountains (T13S R17W Gila and Salt River Meridian); thence northwest on a line down the crest of the Tinajas and Gila Mountains to the 3141 foot peak on the border of the Yuma land as found in Docket No. 319; thence east to the Mohawk Mountains peak of 2900 feet in T10S R13 Gila and Salt River Meridian; thence northwest along the crest of the Mohawk Mountains to Mohawk Pass; thence east to the present town of Gila Bend; thence east southeast on a line through Lost Horse Tank to the peak of Table Top Mountains in T8S R2E, thence east to the northwest corner of the Papago Indian Reservation in R3E; thence east along the northern border of that reservation to its northwest corner in T7S; thence on a line east southeasterly to Picacho Peak and to Red Rock, Arizona; thence east to the peak of Oracle; thence in a southerly direction on a line following the ridge dividing the waters which flow into the San Pedro River from the waters which flow into the Santa Cruz River

to the International Boundary Line; thence west and northwest along the International Boundary Line to the point of beginning.

The following areas are excluded to the extent not taken by the defendant:

a. The San Xavier del Bac Reservation

b. The Papago Indian Reservation as enlarged by the post-1917 additions enumerated in Finding No. 24.

c. Confirmed Spanish and Mexican land grants.

* * * * *

The Papago Tribe of Arizona v. The United States of America, No. 345, 19 Ind. Cl. Comm. 394 at 422 (1968)

In describing the history of that land, the Commission stated:

The subject tract was under Spanish dominion from the early 16th Century until Mexico succeeded to it in 1821. Mexican sovereignty lasted until the Gadsden Purchase in 1854, when the Mexican Government ceded lands including the subject tract to the United States. Due to the constantly expanding non-Indian settlement within the subject tract after 1854, the United States Government decided to concentrate the Papago Tribe within a reservation. Two former attempts to locate all the Papagos on a reservation had failed—the San Xavier Reservation, in 1874; and the Gila Bend Reservation in 1882. Finally, a generally satisfactory solution, at least to the United States, was arrived at, and the present Papago Indian Reservation was established on February 1, 1917. Thereafter, adjustments and additions were effected and the Papago Indian Reservation emerged in its present form. *The Papago Tribe of Arizona v. United States of America, supra* at 425.

The Commission then geographically described the Papago Land ("Papagueria") as follows:

> For convenience, we shall discuss the Papago claim of aboriginal title to the area in the terms of three zones; Western, Central and Eastern. The Western Zone extends from the areas of Yuma occupancy along the Colorado River to the west to the Growler Mountains on the east, between the Gila River and the International Boundary. The Central Zone includes the land between the Growler and Baboquivari Mountains, from the boundary north to the line of Pima occupancy. The Eastern Zone includes the Altar and Santa Cruz River Valleys, from the boundary north to beyond Tucson.
>
> *It is not contested that the Central Zone has been occupied and used by the Papago since time immemorial.* Much of their population has been centered here, and most of the area has been incorporated into the Papago Indian Reservation of today. *(emphasis added) The Papago Tribe of Arizona v. The United States of America, supra* at 426.

The metes and bounds description of "Papagueria" as well as the more general description of the three areas defined by the Indian Claims Commission may be followed on the United States Geological Survey Arizona Base Map (Interior–Geologic Survey, Washington, D.C., 1959–NS, MR 7484). The latter description may also be followed on any standard highway map.

Respondent respectfully requests that the Court take judicial notice of boundary of "Papagueria" as described by the Indian Claims Commission. See, e.g., Proposed Federal Rules of Evidence (1972), Rules 201 (b) (1), 201 (b) (2). While the metes and bounds description of

"Papagueria" was before the trial court, see, App.75-76, no map was included in the record since the geographic features of the area were "generally known within the territorial jurisdiction of the trial court." Proposed Federal Rules of Evidence (1972), Rule 201 (b) (1).